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Supreme Court, U.S.
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No. 02-1411

IN THE
SUPREME COURT OF THE UNITED STATES

The Boeing Company,
Petitioner,

v.

United States of America *ex rel.* Brett Roby,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENT BRETT ROBY'S OBJECTION TO THE MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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I. INTRODUCTION

The Motion by the Chamber of Commerce to file an *amicus curiae* brief supporting Petitioner Boeing should be denied. Despite the mandate of Supreme Court Rule 37.1, the Chamber does not bring new or relevant matter to this Court's attention. Rather, the Chamber either repeats assertions already made by Boeing, or presents arguments that are not relevant to the issues before the Court. In addition, counsel representing the Chamber previously represented in this case a defense-industry lobbyist group, known as the Aerospace Industries Association ("AIA"), that was so closely aligned with Boeing—indeed, Boeing actually guaranteed payment of AIA's legal bills—that the Sixth Circuit twice refused to allow the AIA *amicus* status. The Chamber's proffered *amicus* brief borrows extensively from the AIA's discredited briefs, making clear an inappropriate connection between the two groups.

Given these facts, and in light of this Court's Rule 37.1.b. (which disfavors opposed *amicus* participation at this stage), Respondent Brett Roby respectfully objects to the participation of the Chamber of Commerce as *amicus curiae* in support of Petitioner.

II. THE CHAMBER EITHER REPEATS BOEING'S ARGUMENTS, OR MAKES CLAIMS THAT ARE IRRELEVANT TO THE ISSUES BEFORE THE COURT.

Respondents Roby and the United States brought this False Claims Act case because Petitioner Boeing knowingly sold the Army defective Chinook CH-47D helicopters, yet falsely certified those aircraft as "airworthy." The helicopters were not "airworthy." They contained defective flight-critical transmission gears that could—and did—explode in flight and cause fiery helicopter crashes. One such crash occurred in Saudi Arabia during the final days of Operation Desert Shield, totally destroying the $10 million aircraft and all its contents. Boeing violated the False Claims Act because it submitted claims for payment that falsely represented to the United

States that the helicopters complied fully with all contract requirements when they did not. Boeing took steps to hide this information from the Army.

As a direct, proximate, and foreseeable result of Boeing's representations of quality, conformance and airworthiness, the United States did two things. First, it paid Boeing for the helicopters. Second, it flew the helicopters. But once helicopters containing cracked transmission gears were put into service, the catastrophic failure of that gear and the total destruction of the helicopters were as foreseeable as sunrise. As the Sixth Circuit correctly observed, the defective gear in the Saudi Chinook "was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of [the helicopter] inevitable." Petition App. at 16a n.7.

While there were two issues certified by the District Court for appeal, both involving Boeing's efforts to avoid responsibility for the Saudi crash, the Chamber of Commerce purports to address only one in its proffered *amicus* brief: Boeing's claim that the destroyed Saudi Chinook was "consequential" damage and therefore unrecoverable under the False Claims Act. This assertion was rejected by both the District Court and unanimously by the Sixth Circuit, and Boeing's Petition followed. While the Chamber seeks to occupy *amicus curiae* status, on this issue of the appropriate measure of damages under the Act the Chamber offers no new or relevant argument. Instead, with one notable exception not relevant to the Petition, the Chamber merely echos Boeing's arguments.

The first half of the Chamber's proffered *amicus* brief is seemingly devoted to arguing that False Claims Act damages must be limited in all circumstances to the value of the underlying false claim—in this instance, the $4.1 million claim Boeing made for the doomed Saudi Chinook. The Chamber relies mostly on *United States v. Bornstein*, 423 U.S. 303 (1976)

and *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) for the incorrect proposition that False Claims Act damages are capped in all instances by the amount wrongfully paid on the false claim. *Amicus* Brief at 2-8. Were this the sum total of the Chamber's argument, it most certainly represents needless repetition of arguments made by Boeing. *See* Petition at 22-30, and its heavy treatment of both *Bornstein* and *Aerodex*. But the Chamber goes further and tries to revive a claim that Boeing itself abandoned long ago, and which is thus not before this Court.

In the District Court, Boeing asserted that the "amount wrongfully paid" in connection with the destroyed Chinook was the cost of the defective gear—about $10,000. Before the Sixth Circuit, Boeing advocated the same "amount wrongfully paid" position, but conceded that this amount could be the $4.1 million Boeing was paid to rebuild the doomed Chinook. Neither argument comported with this Court's repeated assertion that False Claims Act damages must be measured to make the United States "completely whole,"[1] and the Sixth Circuit paused briefly to dispense with the "value of the gear" argument:

> Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." Reply Br. at 21. According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight.

Petition App. at 15a (*internal citation omitted*). Boeing's Petition for certiorari makes no mention of this "value of the gear" proposition.

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[1] *Cook County v. United States ex rel. Chandler*, 538 U.S. —, —, 123 S. Ct. 1239, —, 155 L. Ed. 2d 247, 256-257 (2003), *quoting United States v. Neifert-White Co.*, 390 U.S. 228, 232, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968) (emphasis supplied); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 552 (1943); *Bornstein*, 423 U.S. at 314-15 (*quoting Hess*).

The Chamber, though, tries to re-inject this discredited argument into this case, arguing that False Claims Act damages should be limit as a matter of law to "that portion of the contract price attributable to the defective gear." *Amicus* Brief at 7. While the Chamber clearly misapprehends the False Claims Act and this Court's demand for "make whole" relief, the real problem is that an *amicus curiae* is not permitted to raise irrelevant issues that the parties themselves have not brought before this Court. *See* Supreme Court Rule 37.1.[2] The Chamber's effort to do just that is obviously inappropriate.

In any event, the Chamber's (and Boeing's) effort to limit False Claims Act damages in all instances to the "value of the claim" is unsupported even by the principle cases upon which they rely. *Aerodex* actually focuses on the issue of causation between a false claim and the resulting damages—not, as a matter of law, on the "value of the claim." *See* Respondent Roby's Opposition at 23-29. And this Court in *Bornstein* not only allowed damages that exceeded the value of the false claim, but also noted that such amounts represented "replacement costs" for the faulty tubes at issue. *Bornstein*, 423 U.S. at 314. *Accord United States v. Halper*, 490 U.S. 435, 442-46 (1989) (recognizing that making the Government "completely whole" includes consideration of amounts beyond the false claim such as, for example, investigation costs.) Neither *Bornstein* nor *Aerodex* support the Chamber's (and Boeing's) effort to restrict False

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[2] An *amicus* cannot join issues that have not been joined by the parties in interest. *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 520 F.2d 157, 160 n. 3 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *In re Buffalo*, 57 A.D.2d 47, 394 N.Y.S.2d 919, 921 (1977); *Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n.*, 99 Ariz. 270, 408 P.2d 818, 821 (1965) (*amicus* cannot create, extend, or enlarge issue).

Claims Act damages to the "amount wrongfully paid" or the "value of the claim."[3]

Finally, the latter half of the Chamber's *amicus* brief clearly revisits arguments made by Boeing. Therein, the Chamber asserts that "consequential" damages are not recoverable under the False Claims Act—an unexceptional claim that is not in dispute—and then re-defines the helicopter damages at issue in this case as "consequential." *Amicus* Brief at 8-13. This is exactly what Boeing tried to do. Petition at 26-30. Both are wrong. The False Claims Act allows for recovery of all damages sustained "because of the act" that violates the statute. In this case, the prohibited "act" giving rise to Boeing's liability was its false claim that the doomed Saudi Chinook conformed to all contract requirements and was airworthy.

As a direct and foreseeable result of that "act," the Army both paid the $4.1 million claim from Boeing *and began flying a Chinook* that Boeing falsely—and knowingly— represented as airworthy, but that actually would crash soon thereafter. Indeed, neither Boeing nor the Chamber challenge these points, effectively admitting that the Army flew the Chinooks as a direct result of Boeing's false claim, and that the failure of a defective flight-critical component directly causes a Chinook to crash. So the Chamber (and Boeing) tries to avoid these facts. It says that the only thing caused by Boeing's false claim—that is, the only thing the Army did "because of" Boeing's conduct—was pay the bill. *Amicus* Brief at 3-4. But that is not how damages are set by the

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[3] The Chamber also complains that, in setting the value of the Saudi helicopter at zero, the Sixth Circuit "effectively measured the value of the helicopter at the time of the accident[,]" instead of "at the time it was delivered[.]" *Amicus* Brief at 10, n. 4. The Sixth Circuit was not confused. It squarely addressed the issue: "[A] setoff based on value purportedly received would create a perverse incentive system in which government contractors could endanger the lives of American soldiers by providing substandard materiel, and the Army would be deterred from correcting the danger because it would be forced to bear the cost of any use it received from the substandard goods before their defects were discovered." Petition App. at 17a, *quoting United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 305 n. 8 (6th Cir. 1998).

terms of the False Claims Act. Congress did not, though it surely could have, constrain damages to the amount paid. Congress decided for case-by-case analysis of damages, with factual development regarding what really occurred "because of" the false claim, and that is exactly what the courts have done.[4]

III. THE CHAMBER IS INAPPROPRIATELY CONNECTED TO A PARTISAN LOBBYIST GROUP AFFILIATED WITH BOEING, AND IS THUS NOT A TRUE "FRIEND OF THE COURT" IN THIS CASE.

The Chamber is represented by counsel of record who appeared in the courts below on behalf of another proffered *amicus curiae*, a defense industry lobbyist group known as the AIA. But the AIA was very closely allied with Boeing, demonstrating an inappropriate partisanship for one seeking to occupy the position of "friend of the court." The Sixth Circuit thus did not grant AIA *amicus* status.[5] This is important because most of AIA's disallowed arguments have been, often verbatim, reproduced by the Chamber and its counsel in its proffered *amicus* brief to this Court.

The AIA is a partisan lobbyist group that includes many of the largest Government contractors.[6] When the issues on appeal were first presented to the trial court, Boeing contacted AIA, rounded up AIA member support, gave AIA a substantive "white paper" that outlined the arguments that Boeing wanted to see in the AIA brief, was in constant contact with AIA during

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[4] *See, e.g., United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988) (*quoting* S. Rep. 615, 96th Cong., 2d Sess. at 4 (1982)) ("No single rule can, or should be, stated for the determination of damages under the Act...")

[5] *See* Sixth Circuit Case No. 00-4157, Order dated 12/10/02 (denying AIA request to appear as *amicus* supporting Boeing's *en banc* petition). Without comment, the Sixth Circuit did not consider AIA's *amicus* brief when the issues on appeal were first heard.

[6] *See* AIA membership at http://www.aia-aerospace.org/about/members.cfm

the drafting of the AIA brief, and actually *guaranteed* the collection of money to pay fees and costs associated with the brief.[7] Moreover, the AIA's briefing merely repeated assertions made by Boeing, thereby inappropriately inflating the number of pages Boeing could devote to its arguments on appeal. While we learned of this intimate relationship between Boeing and AIA only after the AIA's trial court appearance, we were able to present this evidence to the Sixth Circuit. Suitably informed, that court refused to consider either of AIA's offered *amicus* briefs.

Understandably, the AIA has not tried to appear as *amicus* before this Court. But its counsel has. As a result, the AIA's tainted views have gained voice through the Chamber, a point made clear by the very extensive overlap in the arguments made by each organization. As to the proper measure of damages under the False Claims Act, the AIA argued two points: First, that the helicopter damages at issue in this case were "consequential," and that "consequential" damages are not recoverable under the False Claims Act; and second, that the proper measure of damages in this case should be the value of the defective gear.[8] These are, of course, the precise arguments made by the Chamber—including the "value of the gear" assertion that even Boeing does not raise with this Court.

In addition, in its two *amicus* briefs proffered to the Sixth Circuit, the AIA supported its

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[7] These facts were developed in Relator's Opposition to the Motion by Aerospace Industries Association of America, Inc. For Leave to File Brief as *Amicus Curiae* in Support of Boeing's Petition for Rehearing En Banc at 10-11 (and referenced exhibits) filed with the Sixth Circuit on 11/05/02. Despite aggressive solicitation by Boeing, the Chamber decided not to tender an *amicus* brief below because Boeing was not then a Chamber member. *Id.* at Exhibit F. This obstacle has apparently been overcome.

[8] *See* Brief Of *Amicus Curiae* Aerospace Industries Association of America, Inc. In Support Of Appellant, The Boeing Company (dated 1//29/01) at 19-25; and Brief Of *Amicus Curiae* Aerospace Industries Association of America, Inc. In Support Of The Boeing Company's Petition For Rehearing With Suggestion For Rehearing En Banc (dated 10/25/02) at 5-7.

assertions on these issues with citation to: (a) the False Claims Act; (b) the Senate Report regarding the 1986 amendments; (c) a treatise on damages; and (d) eleven cases. All but two of these authorities were cited by the Chamber in its *amicus* brief.[9] Perhaps more revealing, the Chamber's *amicus* brief often uses the exact same words used by the AIA. For example, footnotes 2 and 3 of the Chamber's *amicus* brief are word-for-word copies of footnotes 16 and 17 from the AIA's first submission to the Sixth Circuit. And the sole block-quotation used by the AIA in the False Claims Act damages section of that brief (at page 22) appears verbatim at pages 5-6 of the Chamber's instant *amicus*.

We will not belabor the point. The Chamber apparently used the rejected AIA's brief as something of a template for the *amicus* it submits to this Court. Since the Sixth Circuit did not allow the AIA's obviously partisan views, we respectfully urge concurrence by this Court regarding the Chamber.[10]

IV. THE CHAMBER IS NOT AN APPROPRIATE *AMICUS CURIAE*.

Participation as *amicus curiae* is a privilege, reserved for those offering a truly impartial perspective not otherwise available to the Court: "The orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court[.]"[11] Unfortunately, the *amicus* privilege has become

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[9] One of these omissions is telling. The Chamber decided not to follow the AIA's lead in citing to this Court's *Marcus* decision, and thus the Chamber was able to avoid confronting this Court's "make whole" language regarding appropriate False Claims Act damages.

[10] It is also worth noting that the Chamber has, independent of any obvious connection with Boeing and the AIA, exhibited hostility towards the False Claims Act. The Chamber recently filed an *amicus* brief in the Fifth Circuit arguing that the *qui tam* provisions are unconstitutional. http://www.uschamber.com/nclc/caselist/issues/falseclaims.htm

[11] *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (emphasis in original) (citations omitted).

evermore subject to abuse, a problem recently and succinctly captured by Chief Judge Posner: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."[12] As a result, courts must guard against a true friend of a *party* slipping through disguised as a friend of the *court*. Indeed, this Court discourages *amicus* briefs that do nothing more than repeat (and thus lengthen) arguments already made by a party in the case. "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Supreme Court Rule 37.1.

In this case, the Chamber of Commerce brings no new relevant matters to the Court's attention. Quite the opposite. When the Chamber is not simply repeating arguments made by Boeing, it is trying to raise issues that have long since been removed from this case—and which no party has raised with the Court. Given this, and in light of the Chamber's close connection with a Boeing-controlled lobbyist group that was forbidden from occupying the position of *amicus curiae* in the court below, Respondent Roby respectfully requests that the Court deny the Chamber's motion to participate in this case.

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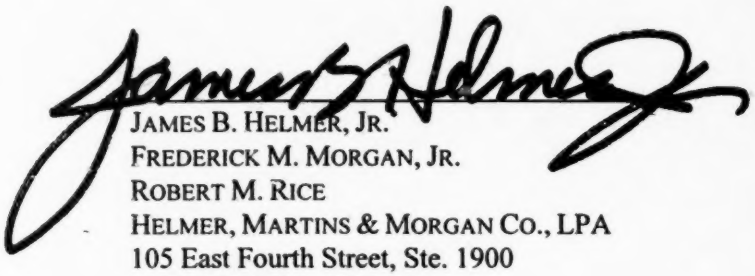
[12] *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Chief Judge Posner further wrote that *amicus curiae* briefs "should normally be allowed when a party is not represented competently or is not represented at all . . . or when the amicus has unique information or perspective that can help the court ***beyond the help that the lawyers for the parties are able to provide***." *Id.* (emphasis supplied; citation omitted).

V. CONCLUSION

For the foregoing reasons, the Motion for Leave to File Brief *Amicus Curiae* by the Chamber of Commerce should be denied.

Respectfully submitted,



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